

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
CIVIL ACTION NO: 3:03CV387**

**BRENICE J. SPAIN,**  
**Plaintiff**

**vs.**

**JO ANNE B. BARNHART,**  
**Commissioner of Social Security,**  
**Defendant.**

**ORDER**

**THIS MATTER IS BEFORE THE COURT** on the “Defendant’s Motion to Dismiss Plaintiff’s Complaint” (Document No. 5) and “Defendant’s Brief in Support ...” (Document No. 6), both filed October 23, 2003 by the Commissioner of the Social Security Administration. Brenice J. Spain has not filed a responsive brief, and the time for doing so has expired. As such, the Motion to Dismiss is ripe for disposition.

Title 42, Section 405(g) of the United States Code is the exclusive jurisdictional basis for judicial review in cases arising under Title II of the Social Security Act. 42 U.S.C. § 405(g). In order for a claimant to obtain judicial review under Section 405(g), a claimant must first have obtained a “final decision of the Commissioner ...” Id.

On August 6, 2001, Ms. Spain applied for Social Security disability insurance benefits, alleging that she became disabled on October 6, 1994. Ms. Spain’s claim was denied initially and then again on reconsideration. On February 24, 2003, the administrative law judge issued an opinion denying Ms. Spain’s claim.

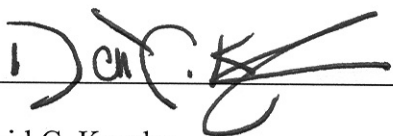
Subsequently, Ms. Spain filed for a Review of Hearing Decision. On May 28, 2003, the

Appeals Council denied Ms. Spain's request for review. By letters dated June 16, 2003 and June 22, 2003, Ms. Spain requested that the Appeals Council stay the May 28, 2003 decision. On August 1, 2003, the Appeals Council vacated its May 28, 2003 decision and stated that it would allow Ms. Spain twenty-five days to submit additional evidence and argument. On that same date, Ms. Spain filed the Complaint in the above-captioned action.

Because the Appeals Council vacated its May 28, 2003, Ms. Spain has not obtained a final decision from the Commissioner. Robin M. Marquis, Chief of the Court Case Preparation and Review Branch 2 of the Office of Appellate Operations, Office of Hearings and Appeals for the Social Security Administration, submitted a declaration in this case in which she stated that, if the above-captioned action were dismissed, the Appeals Council would proceed with action to process Ms. Spain's request for review. As such, this Court has no jurisdictional basis to review her claims.

**IT IS, THEREFORE ORDERED,** that the "Defendant's Motion to Dismiss Plaintiff's Complaint" (Document No. 5) is **GRANTED**. The dismissal shall be without prejudice so that Ms. Spain may bring her claim in this Court – if necessary – once she has received a final decision from the Commissioner.

**Signed: June 3, 2005**



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David C. Keesler  
United States Magistrate Judge

